IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * * * * * * *

NO. 21313

THE STATE OF TEXAS,

Petitioner

V.

FEDERAL POWER COMMISSION,

Respondent

* * * * * * * *

PETITION FOR REVIEW OF ORDERS
OF THE FEDERAL POWER COMMISSION

* * * * * * * *

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FILED

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WM. B. LUCK, CLERK

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THE STATE OF TEXAS,

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PETITION FOR REVIEW OF ORDER
OF THE FEDERAL POWER COMMISSION

* * * * * * * *

To the United States Court of Appeals for the Ninth Circuit and the Honorable Judges Thereof:

The State of Texas, acting by and through its duly elected Attorney General, Waggoner Carr, files this petition pursuant to Section 19(b) of the Natural Gas Act, (Act),[1] for review of Federal Power Commission (Commission) Opinion No. 495, and accompanying orders thereto, issued June 15, 1966, in F.P.C. Docket Nos. CP65-213, CP65-214, CP65-215, review of the Commission's Order denying reconsideration, Waiver of the Commission's Rules and Making Determination of the Question of "Extraordinary Circumstances" issued December 17, 1965 in the same

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[1]Act of June 21, 1938, c.556, 52 Stat. 821, as amended, 15 U.S.C. Section 717-717w, inclusive.

proceedings, and review of the Commission's Order Denying Application for Rehearing issued August 4, 1966, in the same proceedings. This petition is filed pursuant to Section 19(b) of the Natural Gas Act (52 Stat. 831, as amended by 62 Stat. 991, 63 Stat. 107, 72 Stat. 947; 15 U.S.C. §717(r)), and Rule No. 34 of the Rules of this Court.

In support of this petition the State of Texas shows as follows:

I.

PARTIES

The State of Texas intervened in Dockets Nos. CP65-213, 214, 215 on February 12, 1965.

The Commission is an agency of the United States Government created and existing under the laws of the United States. Its membership is composed of Lee C. White, Chairman; John A. Carver, Jr.; Lawrence J. O'Connor, Jr.; Charles R. Ross; and Carl E. Bagge. These Commissioners are duly appointed, qualified, and acting members of the Commission. The Commission and its members are charged with the responsibility of administering the Natural Gas Act. The principal office of the Commission is at 441 G Street, N.W., Washington, D. C. 20426.

II.

FACTS UPON WHICH JURISDICTION AND VENUE ARE BASED

1. The opinions and orders of which review is now sought are final orders under Sections 4 and 5 of the Natural Gas Act

by the Federal Power Commission, a duly constituted agency of the United States, having its principal offices as 441 G Street, N.W., Washington, D. C.

2. Petitioner, a party to the proceeding below in Docket Nos. CP65-213, 214, 215 and dockets consolidated therewith, is aggrieved by the Commission opinions and orders issued therein on Dec. 17, 1965, June 15 & Aug. 4, 1966 in that such opinions and orders are unlawful under and violative of the Natural Gas Act, the Administrative Procedure Act of 1946, and the Constitution of the United States. Petitioner filed a timely application for rehearing in accordance with the requirements of Section 19(a) of the Natural Gas Act which has been denied by Commission action on August 4, 1966, under Section 19(a). This Petition is filed within the time permitted and under the procedures established by Section 19(b) of the Natural Gas Act. Jurisdiction, therefore, is in this Court under Section 19(b) of the Natural Gas Act.

3. This Court has jurisdiction of this appeal by virtue of Section 19(b) of the Natural Gas Act since Pacific Gas Transmission Company, a corporation organized and existing under the laws of the State of California, is "located" and has its "principal place of business" in San Francisco, California and therefore within the territorial boundaries of the Ninth Judicial Circuit of the United States, Pacific Gas Transmission Company being the natural gas company to which the subject order and opinion under attack relate, and thus venue also is in this Court.

III.

NATURE OF PROCEEDINGS

The State of Texas intervened in the subject cause for the purposes (1) of opposing the plan and application of Pacific Gas Transmission Company to import from Canada some 200,000,000 cubic feet of natural gas per day for delivery principally to the San Francisco Bay Area and, to some extent, other parts of Northern California, the results of which will create an undependable, unnecessary and inadvisable supply of imported gas in the area of Northern California to the detriment of domestic producers, the national economy, the California consumers, and the public in general, and (2) of suggesting a more desirable source of gas supply for consideration, as an alternative to the supply sought by applicant.

As intervenor herein, the State of Texas did not urge a curtailment of natural gas imports from Canada nor does the State of Texas seek a cessation of timely increases in the volume of Canadian gas brought into the United States; however, the State of Texas firmly advocates a provident policy of utilization of gas from the most dependable and cheapest available source, wherever it may be found, so that, in this instance, Northern California consumers may have a continuous, dependable, and increasing supply of natural gas from a source, not determined merely by provincial or corporate aggrandizement, but rather based on the best source of supply thereof for both Northern California and the Nation.

The State of Texas believes that the Commission has erred in its determinations in Opinion No. 495, and the opinion contravenes the Natural Gas Act and the well established case law of the United States.

IV.

GROUNDS UPON WHICH RELIEF IS SOUGHT

As set forth hereinabove and in the State of Texas' application for rehearing[2] the State of Texas contends that the Commission committed the following errors in Opinion No. 495:

1. The Commission erred in ignoring the record evidence which establishes the inadequacy of the supply of natural gas upon which the applicant would depend.

2. The Commission erred in allowing contracts with price escalation clauses to be used.

3. The Commission erred in refusing to admit relevant evidence of the State of Texas into the record showing a presently available, more economic and desirable, alternate supply of natural gas produced in Texas.

4. The Commission's decision was reached without sufficient regard to or full consideration of a presently available, more economic and desirable, alternate supply of natural

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[2] A copy of the application for rehearing is annexed hereto as Appendix A which is hereby incorporated herein. Every allegation and contention there made is renewed and repeated as fully as though set forth herein.

gas produced in Texas.

5. The Commission erred in placing unjustified emphasis on the original authorization of the subject project.

Petitioner by summarizing the errors of the Commission does not limit the assignment of error to the ones listed; on the contrary, as heretofore stated, every allegation and contention made in its application for rehearing is renewed and repeated as fully as set forth above.

V.

AGGRIEVEMENT AND RELIEF PRAYED

The State of Texas has been aggrieved by Opinion No. 495 for the reasons set out above. Therefore, for all the foregoing reasons Petitioner prays:

(a) That the Clerk of this Court serve a copy of the petition upon the Respondent, Federal Power Commission at its official address, 441 G Street, N.W., Washington, D. C. 20426, in accordance with the provisions of Section 19(b) of the Natural Gas Act;

(b) That this Court direct the Commission, in conformity with Section 19(b) of the Natural Gas Act (15 U.S.C. Sec.717r(b)), to certify and file with the Clerk of this

Court the official transcript of the record in the proceedings here sought to be reviewed;

(c) That the Court review the Commission's Opinion No. 495 issued June 15, 1966, and its Orders of December 17, 1965, June 15, 1966, and August 4, 1966, respectively, and upon such review, reverse and set aside this opinion and orders with regard to the errors specified in this Petition and

(d) That the Court exercise jurisdiction over the parties and subject matter of this petition and grant to Petitioner such other and further relief as the rights and equities of the cause may render appropriate in the premises.

Respectfully submitted,

THE STATE OF TEXAS

WAGGONER CARR
Attorney General of Texas

Linward Shivers

LINWARD SHIVERS
Assistant Attorney General

C. Daniel Jones Jr.

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First Assistant Attorney General

T. B. WRIGHT
Executive Assistant

J. ARTHUR SANDLIN
Assistant Attorney General

THE STATE OF TEXAS)
COUNTY OF TRAVIS)

LINWARD SHIVERS, being first duly sworn according to law deposes and says that he is an Assistant Attorney General for the State of Texas; that as such he has signed the foregoing document; that he is authorized so to do; that he has read said document and is familiar with the contents thereof; and, that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

Linward Shivers
LINWARD SHIVERS

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, this 28th day of September, 1966.

(SEAL)

Virginia Owens
VIRGINIA OWENS
Notary Public in and for
Travis County, Texas

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing "Petition for Review of Orders of the Federal Power Commission" upon the following party:

Howard E. Wahrenbrock, Solicitor
Federal Power Commission
441 G Street, N.W.
Washington, D. C. 20426

and all parties to the proceeding.

Dated at Austin, Texas this 28th day of September, 1966.

Linward Shivers
LINWARD SHIVERS

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of PACIFIC GAS TRANSMISSION COMPANY	)	Docket Nos. CP65-213 CP65-214 CP65-215

APPLICATION OF THE STATE OF TEXAS
FOR REHEARING OF OPINION NO. 495
AND THE COMMISSION'S ORDERS OF JUNE 15, 1966

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General

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TABLE OF CONTENTS

		Page
I.	PRELIMINARY STATEMENT.....	1
II.	SPECIFICATION OF ERROR.....	2
	A. The Commission Erred in ignoring the record evidence which establishes the inadequacy of the supply of natural gas upon which the applicant would depend.....	3
	B. The Commission erred in allowing contracts with price escalation clauses to be used.....	3
	C. The Commission's decision was reached without sufficient regard to or full consideration of a presently available, alternate supply of natural gas produced in Texas.....	4
	D. The Commission erred in placing unjustified emphasis on the original authorization of the subject project..	5

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of	)	Docket Nos. CP65-213
	)	CP65-214
PACIFIC GAS TRANSMISSION	)	CP65-215
COMPANY	)	

APPLICATION OF THE STATE OF TEXAS
FOR REHEARING OF OPINION NO. 495
AND THE COMMISSION'S ORDERS OF JUNE 15, 1966

Pursuant to the provisions of Section 19(a) of the Natural Gas Act of 1938, 52 Stat. 832, 15 U.S.C. § 717 (r) (Act), the State of Texas hereby files this application for rehearing of the Commission's orders of June 15, 1966, Opinion No. 495 in the above styled proceeding, hereinafter referred to as Opinion No. 495. As required by Section 19(a), *supra*, The State of Texas submits the following grounds in support of its application.

PRELIMINARY STATEMENT

The State of Texas intervened in the above styled proceeding by filing its notice of intervention dated February 12, 1965.

As pointed out in the initial brief filed herein, The State of Texas has intervened in the captioned proceedings for the purposes (1) of opposing the plan and application of Pacific Gas Transmission Company to import from Canada some 200,000,000 cubic feet of natural gas per day for delivery principally to the San Francisco Bay Area and, to some extent, other parts of Northern California, the results of which will

create an undependable, unnecessary and inadvisable supply of imported gas in the area of Northern California to the detriment of domestic producers, the national economy, the California consumers, and the public in general, and (2) of suggesting a more desirable source of gas supply for consideration, as an alternative to the supply sought by applicant.

As intervenor herein, the State of Texas did not urge a curtailment of natural gas imports from Canada nor does the State of Texas seek a cessation of timely increases in the volume of Canadian gas brought into the United States; however, the State of Texas firmly advocates a provident policy of utilization of gas from the most dependable and cheapest available source, wherever it may be found, so that, in this instance, Northern California consumers may have a continuous, dependable, and increasing supply of natural gas from a source, not determined merely by provincial or corporate aggrandizement, but rather based on the best source of supply thereof for both Northern California and the Nation.

The State of Texas believes that the Commission has erred in certain of its determinations in Opinion No. 495, and as a specification of such error contained in said Opinion No. 495, the State of Texas alleges and states as follows:

SPECIFICATION OF ERROR

I.

THE COMMISSION ERRED IN IGNORING THE RECORD EVIDENCE WHICH ESTABLISHES THE INADEQUACY OF THE SUPPLY OF NATURAL GAS UPON WHICH THE APPLICANT WOULD DEPEND.

In Opinion 495 the Commission has disregarded (1) the ultimate limits of the volume of gas authorized for export by foreign govermental authority (which was not developed in this hearing except in the form of a conclusion), (2) the physical insufficiency of the supply itself, (3) the possible result of future diversion of Canadian gas by the Canadian government.

II.

THE COMMISSION ERRED IN ALLOWING CONTRACTS WITH PRICE ESCALATION CLAUSES TO BE USED.

The uncertainty of future prices of imported Canadian gas sought by applicant was largely disregarded by the Commission. The uncertainty of price of such Canadian gas is abundantly evident in the record.

A double standard will emerge for pricing of gas sold in the United States if the Commission allows its order to stand. While the price of domestic gas is firmly set by governmental control and supervision, the price of Canadian gas imported into this country is free to fluctuate and thereby increase in accordance with various re-negotiation provisions and weighted average clauses of gas purchase contracts and under so-called "postage stamp" policies.

Certainly this is rank discrimination against the domestic producer.

III.

THE COMMISSION'S DECISION WAS REACHED WITHOUT SUFFICIENT REGARD TO OR FULL CONSIDERATION OF A PRESENTLY AVAILABLE, ALTERNATE SUPPLY OF NATURAL GAS PRODUCED IN TEXAS.

The State of Texas continuously undertook to offer testimony from two witnesses evidencing a presently available supply of gas produced in Texas and a means of delivering it to the California border as an alternative and more economic and desirable source than the foreign source sought by Applicant; however, said testimony was never permitted to be placed in the record for consideration in its entirety, and regretably the State of Texas was, with reference thereto, limited to mere Offers of Proof.

During the hearing herein, the State of Texas even undertook to file a motion before the Commission requesting a ruling therefrom that subpoenas ducas tecum should issue for its witnesses and that the Presiding Examiner's ruling rejecting such testimony be overruled. In the first place, long after such motion had been filed, it was "rejected" apparently by the "Secretary of the Federal Power Commission," who apparently took upon himself to construe the nature of such motion, although said motion was of course directed to the Commission itself under the Commission's Rules of Practice and Procedure. Faced with such action by the Secretary, the State of Texas again sought to have its highly relevant and important testimony described hereinbelow placed in evidence by filing with the Commission its "Application For Reconsideration and For Waiver Of the Commission's Rules, If Necessary, and Request For the Commission's Determination

of the Question of 'Extraordinary Circumstances'". Said "Application and Request" was denied. Therefore, never has the State of Texas been permitted to place its said testimony in the record herein for full consideration nor to fully develop its position, but, to the contrary, has merely been granted Offers of Proof, which cannot help but be by their nature an ineffectual means of preparing a record.

In that connection, the testimony, to which said "Offers of Proof" are directed, would evidence an alternate, dependable supply of gas from Texas available to Pacific Gas & Electric Company in a sufficient volume to fulfill P.G. & E.'s requirement for gas sought to be supplied by Applicant from Canadian sources and at a lower price at the California border than the price of the Canadian gas sought under the pending application.

The Presiding Examiner, in preparing and rendering the Initial Decision, refused to give any consideration whatsoever to the alternate supply of gas from Texas because no competitive application was filed by El Paso Natural Gas Company, through the lines of which such Texas gas would have to be supplied to the California market (Initial Decision, pages 16-17); however, although counsel for El Paso Natural Gas Company indicated that the company had no "excess capacity" in its lines at the present time by virtue of which it could make deliveries and had filed no competing application in the captioned proceedings, El Paso Natural Gas Company did in fact intervene as a party herein and has maintained a completely neutral position in this proceeding and has never objected in any manner to the possibility of carrying additional gas to

the California market. Furthermore, the terms, "excess capacity", and "unfilled capacity", have never been defined in this hearing, and no determination has been made herein as to the context in which the terms were used.

Moreover, in the original application in the Gulf Pacific Case (Docket No. CP 64-76), El Paso Natural Gas Company showed therein that it could deliver an additional 250,000 Mcf per day to the California border by reinforcing its existing facilities from Texas, and in a first amended application, alternatively showed therein that it could deliver 575,000 Mcf per day to the California border via a proposed new pipeline from New Mexico (known as the "Chaco-Needles Line"), as well as the aforementioned 250,000 Mcf per day by reinforcement of existing facilities (Tr. 426-427). Furthermore, Mr. Barry Hunsaker, Chief Engineer and vice president of El Paso Natural Gas Company, testified that, at the request of the Southern California distributor companies, he had prepared exhibits demonstrating another alternative, by virtue of which El Paso Natural Gas Company could deliver to the California border 250,000 Mcf per day heretofore mentioned plus an additional 325,000 Mcf per day making a total 575,000 Mcf per day merely by reinforcing its existing pipelines (without constructing the "Chaco-Needles Line") (Tr. 413-415). Since El Paso Natural Gas Company did not make application to deliver this additional 325,000 Mcf per day through its existing pipelines, this alternative is as available for consideration by the Commission today as it was when the said testimony and exhibits of Mr. Barry Hunsaker were prepared.

Not only are the said testimony and exhibits of Mr. Barry Hunsaker highly relevant and material in the matters here under consideration, but also their admission into the record herein as evidence, as requested by the State of Texas, is in keeping with the holdings in City of Pittsburg vs. Federal Power Commission, 237 Fed. 2nd 741 (D.C. Cir. 1956) and the "Rock Springs" case, 30 FPC 77 (1963), that the Commission should consider alternative means to determine whether a particular proposal would serve the public convenience and necessity, regardless of whether a formal application or competitive application is made with reference to such proposal.

In the abovementioned City of Pittsburg Case, the District of Columbia Circuit Court of Appeals set forth the following rule:

> "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the (original) proposal." City of Pittsburg vs. Federal Power Commission, 237 Fed 2nd 741 (D.C. Cir. 1956).

Furthermore, such a rule has been subsequently followed by the United States Court of Appeals for the Second Circuit, as evidenced by its opinion declaring that a project under consideration by the Commission must be compared with any alternatives that are available and its following statements from such opinion:

> ". . .the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission."

> "The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts." Scenic Hudson Preservation Conference et al vs. Federal Power Commission, 354 Fed. 2nd 608 (Second Cir. 1965); Also see Michigan Consolidated Gas Co. vs. Federal Power Commission, 283 Fed. 2nd 204 (D.C. Cir., cert. denied, 364 U.S. 913, 1960).

In addition, as reflected by the present record, Applicant's own witness testified that the incremental price of such available "Texas" gas at the California border (Topock) is approximately 22 cents per Mcf, which is a cheaper price than even the original incremental price of Applicant's proposed imported gas at the California border (Tr. 1219-1222).

Evidence has been placed in this record that El Paso Natural Gas Company can furnish desirable natural gas to the Northern California market at a lower California border price than that of the foreign gas proposed by Applicant. The State of Texas should be permitted to make a showing that there is in fact a presently existing, alternate supply of natural gas available to the Northern California market, which is more desirable and may be produced at a lower price than the imported gas herein proposed. Such a showing of evidence should be permitted in this hearing, especially in the light of the Initial Decision in the Gulf Pacific case and especially since the testimony proposed by the State of Texas (together with the cross-examination in connection therewith) may reflect that El Paso Natural Gas Company can presently supply Northern California with such available gas and is desirous of so serving the Northern California market. As is stated by the Court in the Hudson River Case:

> "If the Commission is properly to discharge its duty. . .; the record on which it bases its determination must be complete. The petitioners and the public at large have the right to demand this completeness." (Emphasis added) Scenic Hudson Preservation Conference et al vs. Federal Power Commission, 354 Fed. 2nd 608 (Second Cir., 1965).

The State of Texas further submits that, if the witnesses it sought to call had been permitted to testify (and to be available for cross-examination), the record in these proceedings would have been supported by overwhelming evidence confirming this State's position as a party intervenor herein and substantiating the record established herein that a dependable natural gas supply for the Northern California market is presently available in Texas, which can be transported to the California border through existing facilities and can be sold there at a firm price and a price lower than the relatively unreliable foreign gas proposed for importation by Applicant.

IV.

THE COMMISSION ERRED IN PLACING UNJUSTIFIED EMPHASIS ON THE ORIGINAL AUTHORIZATION OF THE SUBJECT PROJECT.

In the original proceeding in which authorization for a 36-inch pipeline was granted by the "various regulatory agencies," no objection was made to the oversized pipeline as proposed by Applicant, and therefore, the adversary system was not at such time evoked, and an airing of all facts - favorable and unfavorable - which opposition at a hearing would elicit, was never fully made. A question exists as to whether such oversized pipeline would have been authorized on August 5, 1960, if the application and the plan of Applicant therein had in fact been opposed.

Nevertheless, no more can be assumed than that the Applicant indicated in said original hearing "that future authorizations would be sought to import additional volumes of natural gas to utilize the full capacity of the line." Surely, it cannot be assumed that the Federal Power Commission, by granting the original application, thereby concluded that all future applications by Pacific Gas Transmission Company regarding additional utilization of such pipeline would be granted at any and all times without question.

The State of Texas says that such assumption was never intended; that this is not the time to permit additional importation of gas into the Northern California area; and that any economic advantage of a presently oversized pipeline in this instance is far outweighted by the disadvantages of (1) inadequency of supply, (2) uncertainty of prices (3) unnecessary dependency on foreign gas, and (4) relatively high costs when compared with an available, alternate, domestic supply, all of which disadvantages, as discussed hereinabove, are inherent in the proposal of Applicant in the captioned proceedings.

WHEREFORE, the State of Texas respectfully requests that the Commission grant a rehearing and oral arguments in these proceedings so that a full consideration can be given to the alternative source of supply of gas, and upon rehearing deny the pending application in full.

THE STATE OF TEXAS

WAGGONER CARR
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Austin 11, Texas 78711

VERIFICATION

STATE OF TEXAS)
COUNTY OF TRAVIS)

Linward Shivers, being first duly sworn, deposes and says that he is an assistant attorney general for the State of Texas, that as such he has signed the foregoing "Application for Rehearing;" that he is authorized so to do; that he has read said Application and is familiar with the contents thereof, and that the matters and things therein set forth are true and correct to the best of his knowledge, information and belief.

LINWARD SHIVERS

SWORN TO AND SUBSCRIBED BEFORE ME,

this 6th day of July, 1966.

David Longoria

Notary Public in and for
Travis County, T E X A S

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties appearing on the Service List of the Secretary of the Commission in these proceedings, in accordance with the requirements of Par. 1.17 of the Rules of Practice and Procedure.

Dated at Austin, Texas, this 6th day of July, 1966.

Linward Shivers

LINWARD SHIVERS